IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Homburg L.P. Management Inc. v. Lappin, 2009 NSSM 26

Claim No: 302665

BETWEEN:

HOMBURG L.P. MANAGEMENT INCORPORATED
as general partner for HOMBURG FUND (38) LIMITED PARTNERSHIP

Claimant

- and -

SUSAN LAPPIN

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on January 14, January 28, and February 18, 2009

Decision rendered on April 16, 2009

APPEARANCES

For the Claimant Michael O'Hara Counsel

For the Defendant Joseph Lappin Solicitor

BY THE COURT:

[1] This is a claim by a commercial landlord for accelerated rent and other relief consequent upon the tenant, a medical doctor, having terminated her lease before the expiry date, without seeking permission or giving notice. The claim seeks approximately $22,000.00 plus costs.

[2] The Defendant has counterclaimed for damages resulting from what she says were breaches of the lease by the landlord. She also claims that these breaches were so fundamental that they amounted to a failure of consideration, giving rise to a right to terminate the lease without notice and without being required to make any further payments.

[3] Many of the basic facts are not in dispute, but there are important differences on a number of points which I will consider as they arise.

[4] The Claimant is a significant commercial and residential landlord in this area. In January 2003 it acquired the strip mall at 619 Sackville Drive in Lower Sackville, Nova Scotia. This mall contained a number of businesses including, at that time, the Defendant's medical practice, Chris Brothers Deli and others.

[5] The Defendant Susan Lappin is a family physician with a special interest in obstetrics and, quite evidently and even proudly, very little interest in managing the business aspects of a medical practice. This task was largely delegated to her husband, Joseph Lappin, who is a solicitor and chartered accountant employed full time with the Department of the Auditor General of Nova Scotia. He undertook to look after most of the

financial and other business aspects of the practice, although on a day to day basis the Defendant's office staff handled matters as they arose.

[6] Mr. Lappin also represented Dr. Lappin at this hearing and gave testimony on her behalf.

[7] The Defendant had been in the premises since very early August 1998, having signed a full-length commercial lease dated July 14, 1998 with the then-owner Kiel Developments Limited. That lease was renewed after five years, by virtue of a short page-and-a-half renewal document dated July 31, 2003.

Issue: the expiry date of the lease

[8] The Defendant argues that her lease actually expired on July 31, 2008 rather than August 31, 2008. If she is right, this would (at least) reduce the landlord's claim by one full month.

[9] This argument is based on the fact that the original lease purported to be for five years, ending on August 31, 2003; yet, she took occupancy on the 1st of August 1998, preparatory to opening to the public on August 4th - the day after the Natal Day long weekend.

[10] Even though the renewal document purported to run from September 1, 2003 to August 31, 2008, the Defendant says that this merely perpetuated an error; the first lease ought to have expired on July 31, 2003 and the renewal ought to have run to July 31, 2008.

[11] The Defendant concedes that on two separate occasions prior to the lease renewal, she signed estoppel certificates. The occasion was that the property was being sold, first by Kiel to a company called Centaur in November 1998, and later by Centaur to Homburg in 2003. Each of these two estoppel certificates confirmed that the lease ran to August 31, 2003.

[12] The relevant precise wording in each of the certificates is this:

> "[The Tenant] certifies to the purchaser ..... [that] the term of the Lease commenced on September 1, 1998, and ends on August 30, 2003, unless the Tenant renews the Lease in accordance with its terms ...."

[13] The estoppel certificates go on to confirm such other things as that the Tenant had no outstanding claims or counterclaims against the Landlord.

[14] I indicated at the hearing that I could not accept the argument that the lease expiry date is other than as appears in the lease renewal. Whether or not there might have been a drafting error in the initial lease, there was no complaint made and the renewal document is clear on its face as to the second term. The estoppel certificates signed in 1998 and 2003 also make it clear as to the initial lease term. The purpose of estoppel certificates is so that new owners know the terms of the leases that they are assuming and the tenants are estopped from denying these leases or raising claims at a time when the successor landlord is in place and at an obvious disadvantage in terms of countering any claim made by the tenant.

[15] The Defendant advanced the argument that this landlord could not have really relied on the estoppel certificates because this small premises

represents an almost infinitesimal proportion of its considerable holdings. I know of no principal or authority which would support this argument. It is tantamount to saying that a large landlord does not really care about every small lease, because they have so many of them. One might as well say that Warren Buffet does not care about his small investments because he has so many of them. I do not think that this is the attitude that has made him so successful.

[16] In my view, I must accept the lease and the term set out therein as representing the legal bargain between these parties, unless the tenant could make out a case for rectification. The evidence in this case falls significantly short of demonstrating that there was the kind of mutual mistake or misrepresentation that might allow for rectification. And even if there had once been a case for rectification, the estoppel certificates stand firmly in the way of such a claim being advanced at this late date, as the certificates confirm that there are no outstanding claims that the Tenant could make against the Landlord. There might also be limitations issues, were such a claim to be considered, but the analysis does not need to progress that far.

[17] I find as a fact that the lease term expired on August 31, 2008.

Issue: unresponsive landlord

[18] The Defendant and her husband testified that their decision to leave the tenancy early was the culmination of years of frustration. As I have identified them, the issues that they referred to consisted of the following:

A. Signs posted by their next-door tenant, Chris Brothers, purporting to limit parking in the mall lot to customers of Chris Brothers only, when those spaces were intended to be available to customers of all of the tenants. This was said to be a breach of Clauses 26 and 29 of the lease, pertaining to Common Area Use and Parking.

B. Delivery trucks for Chris Brothers frequently blocking the exit from the rear parking lot, creating an inconvenience for Dr. Lappin and others. This was also said to be a breach of Clauses 26 and 29 of the lease, pertaining to Common Area Use and Parking.

C. Excessive smells coming from the dumpster in the rear.

D. Water leaks coming through the back door, causing the carpeting to be soaked after heavy rains. Other issues of unresponsiveness to complaints about needed repairs were also cited. These were said to be breaches of the duty to repair found in Clause 17 of the lease.

E. A poor interior paint job, which had been done by a company hired by the landlord as an incentive for the lease renewal. This paint job had been specifically promised in paragraph 3 of the 2003 lease renewal agreement.

F. The removal of security patrols (which had been placed for a while to deter graffiti artists) without notifying the tenants, and contrary to signs placed around the mall indicating that it was patrolled by security. This was said to be another breach of Clause 26 pertaining to Common Area Use.

G. The renting of another unit in the Mall to a tanning salon, which is a business that Dr. Lappin considers unhealthy due to the association of tanning with skin cancers. Dr. Lappin claims that the landlord breached the Quiet Enjoyment Clause in the lease - Clause 66 - by forcing upon her an association that was repugnant and embarrassing to her, and potentially dangerous to those of her patients who might have believed that Dr. Lappin endorsed tanning salons.

[19] The Defence and Counterclaim makes reference to several other complaints which were not seriously pursued at the trial. One of the complaints is that small rocks appear to have fallen (or been thrown) from above the gabion wall at the rear of the property, interfering with parking and possibly damaging vehicles. Another was inadequate salting of the rear parking lot during icy conditions.

[20] In a more general sense, the Defendant and her husband complained that the property managers at relevant times were unresponsive and apparently uninterested in seeing to the grievances, large or small, that eventually led them to believe that their interests were better suited by leasing elsewhere.

[21] While I do intend to comment upon all of these grievances in turn, as a general comment I observe that they do not, in my judgment, add up to a fundamental breach of contract by the landlord.

[22] One of the problems that the Defendant cannot overcome is the fact that there is virtually no reliable record of these grievances ever having been brought to the attention of the landlord in any formal sense. There was evidence that from time to time there would be complaints or issues raised verbally with the landlord's maintenance staff who were at the premises frequently. However, they were seldom if ever raised with the persons who had a higher level of responsibility and they were never put in writing. One would expect that a tenant becoming frustrated with a commercial landlord to the point of wanting to break the lease, would have engaged in a lively and escalating correspondence to the effect that if certain issues were not addressed, then certain consequences would flow. There was none of that.

[23] The excuses for not complaining in writing were several. They believed it was sufficient to complain to the on-site staff. Mr. Lappin was too busy. Dr. Lappin did not concern herself with these details. Office staff had better things to do. They did not think it would do any good. And they were not sure as to whom precisely they ought to have complained.

[24] This lack of a written history of complaint creates two problems. One is evidentiary. There simply is not a good evidentiary record that would substantiate the claim that these problems were of a sufficiently serious concern to the Defendant. The second difficulty is that there is no evidence that the landlord had actual knowledge of the complaints, with the onus then being on the landlord to attend to those complaints, or else.

[25] The obligations of a commercial landlord under a lease would include being responsive to issues such as those raised by the Defendant, but it

cannot be expected to respond to problems that it does not know about or believes are not of serious concern.

[26] All of this is not to suggest that some of the complaints did not have merit. As I will set out later, I think they did, but they still fall far short of giving rise to a right to have the lease rescinded on the basis of a total breach of contract.

[27] Both the Defendant and Mr. Lappin testified that they considered the lease to be a very onerous one, entirely favouring the landlord, and that they had a real fear that the landlord might resort to extreme remedies such as distraining on their personal property (including medical files!) if they let on that they were contemplating breaking the lease. It occurs to me that this fear of the lease and what powers the landlord might exercise, was perhaps behind the decision not to complain too loudly. I also believe that the Defendant probably resigned herself to finishing out the term of the lease and did not anticipate finding another premises at a time which forced her to make a sudden move.

SPECIFIC COMPLAINTS

Chris Brothers Signs

[28] The landlord's witnesses testified that they were not aware of Chris Brothers placing these signs, which they conceded would have been contrary to their lease. Clause 29 of the Defendant's lease states:

> "The Tenant, its employees, suppliers and other persons not customers having business with the Tenant shall have nonexclusive rights to use in common with all customers, other tenants and their employees, suppliers and other persons the parking areas of the Shopping Centre."

[29] Both the Defendant and her husband, and several witnesses that they called, spoke to the signs being there for some period of time. I cannot ignore that evidence. I must conclude that the property manager and others were simply not observant and somehow were blind to this. It does not speak favourably of their powers of observation or attentiveness to detail. However, in the final analysis these signs would have been little more than a minor irritant since there is no evidence that any of the Defendant's patients or staff were unable to find parking, or even were seriously inconvenienced. It appears that there was adequate parking, and the worst that might have happened is that some patients might have avoided a couple of choice spots for fear of having their cars ticketed or towed.

Delivery trucks for Chris Brothers frequently blocking the exit

[30] The configuration of the Mall is such that access to the rear lot is limited to two alleys or lanes on either side of the building, and the area is too narrow for cars to turn around easily. Chris Brothers appears to have developed a habit of parking its trucks blocking one of the two alleys, with the result that cars would have to attempt to turn around and exit the other way.

[31] I would also classify this as a minor annoyance and inconvenience. The landlord probably could have done more to police Chris Brothers. Again, there was no written record that might have put the landlord on the spot to take steps, or face the consequences. The lack of written record also makes it difficult for me to be satisfied as to how often this actually occurred.

Excessive smells coming from the dumpster in the rear

[32] It is hardly surprising that there might have been unpleasant odours emanating from a dumpster being used by a food business. On the available evidence, it is impossible for me to assess whether there was anything more that reasonably could have been done to mitigate the smell. The dumpster was emptied on a regular basis. Again, there is no evidence that this was anything more than a minor annoyance on certain days (especially hot ones) for Dr. Lappin and those of her staff who used the rear parking lot. Dr. Lappin further complained that the dumpster attracted bees and wasps, and that she has an allergy to stinging insects, but there was no evidence that the landlord was made aware of this particular concern.

Water leaks coming through the back door and other leaks

[33] The landlord has a duty under Clause 17 of the lease to repair common areas. It appears that the rear door to the Defendant's unit, which would be a common area, was at some unspecified time damaged by a snow plow. The result was that it no longer created a perfect seal and rain would infiltrate the unit, at times soaking the carpeting nearest to the door.

[34] The evidence of the Defendant was that this problem had been brought to the attention of the maintenance people on numerous occasions, but that it took a long time for it to be finally repaired. As a result, there was damage to the carpet and the development of mould.

[35] Again there is no written record of complaint. This is particularly problematic for the Defendant because of Clause 19(c) which places a very specific onus on the tenant to:

> "..... give prompt written notice to the Landlord of the existence of any condition including any need for repair within the Premises of which it, its employees or contractors has or should have knowledge which might cause any damage or injury or is a hazard to any portion of the Shopping Centre, notwithstanding that the Landlord may have no obligation in respect thereof, and any need for repair which is the Landlord's obligation under Clause 17." (Emphasis added)

[36] The lack of a written record is therefore not just an evidentiary problem for the Tenant - its is a breach of her obligations.

[37] Again I emphasize that the reasons offered by the Defendant for never having complained in writing, are extraordinarily weak. The Defendant and her husband are highly educated, sophisticated individuals. It is difficult to believe that they would not have made sure that their complaints were heard loud and clear at the highest levels, if they were important enough in the grand scheme of things.

[38] The picture of them as being intimidated by a stronger party with an onerous lease does not resonate with me. There was no reason to be concerned that the landlord would do anything damaging to the tenant, so long as rent was in good standing. All the Defendant and her husband had to do was read the lease and find the terms thereof favourable to them, and insist upon their rights. There is nothing that the landlord could have done in retaliation. The worst that might have happened is that the complaints would have been ignored, which might have set the stage for a claim such as that now being advanced by the Tenant based upon breach of contract.

[39] I do recognize that there was a minor history of rent arrears and NSF cheques, which the Claimant argued may help explain some of the Defendant's actions. I am not convinced that this factored in at all. I accept that the payment problems were as a result of Mr. Lappin's admitted inefficiency and inattention, given all of his other commitments, and that they were not a reflection of any real financial problems. What they do reflect, however, is that - viewed in retrospect - Mr. Lappin did not always devote the time and effort to managing his wife's business as he should have, which lack of time and effort also led to complaints not being raised in a timely way.

The tanning salon

[40] Clause 66 of the lease is a brief "quiet enjoyment" clause, entitling the tenant to "peaceful and quiet enjoyment" of the premises without "interruption or interference" by the landlord.

[41] It is well known that there are leases which contain covenants that restrict the landlord from leasing to certain other tenants who may be competitors, or whose business may be antithetical to that of the primary tenant. This is not such a lease.

[42] There is also no record of a complaint by the Defendant to the renting of premises to the tanning salon. Nor was there any evidence that the landlord knew or ought to have known that this Defendant (or indeed any medical doctor) would have felt personally affronted by being neighbours in a shopping mall with a tanning salon. Tanning is not an illegal business. It is far from unanimously or notoriously denounced in medical circles.

[43] If in fact some of Dr. Lappin's patients illogically drew the conclusion that Dr. Lappin personally endorsed tanning as a healthy pursuit, simply because they were in the same strip mall, this was not a consequence that the landlord could reasonably have predicted.

[44] I cannot give any credence to this complaint.

The poor interior paint job

[45] Paragraph 3 of the lease renewal obligates the landlord to install new ceramic tile or sheet flooring in the reception area and "paint the entire interior premises in a colour as chosen by the Tenant."

[46] The evidence was to the effect that the landlord arranged for a painting company to perform the work, which company it regularly uses for painting

jobs. The painting was done in the late summer or fall of 2003 after the renewal was signed.

[47] The Defendant introduced a significant amount of evidence to show that the painting was sloppily done; for example, the painters painted around some furniture and fixtures rather than removing and replacing them. Paint was evidently smeared on file storage units and other furniture, and never properly cleaned. Also it appears that in most areas, if not throughout, only one coat was used, giving rise to a less than professional appearance.

[48] On the evidence, which includes photographs, I allow for the fact that this paint job very likely left a lot to be desired. However, the very same problem stands in the way of the Defendant obtaining any relief: there is no evidence of any complaint. The Defendant was assertive or astute enough to bargain for a paint job as a condition of renewal. If all of the complaints were known soon after the job was done, the Defendant ought to have stood up for herself at the earliest possible moment and said "this will not do!" Instead, it appears that she and her husband kept their thoughts to themselves, perhaps building up an internally felt sense of grievance but doing nothing to secure a legal position with respect to those issues.

[49] Under the circumstances, it is simply too late for this alleged problem to be raised to any legal effect. While no medals ought to be pinned on the landlord for allowing this paint job, nor ought any liability be pinned on it.

The removal of security patrols

[50] The evidence of property manager Brenda Ruggles was that in about September of 2005 there had been a problem with graffiti being drawn on the back of the building. As a result, signs were posted to the effect that the premises were being monitored, and actual security patrols were instituted. Ms. Ruggles testified that she advised tenants that it would only be for a few months, and that after a few months (when the graffiti seemed to stop) she discontinued the patrols.

[51] It does appear that the signs remained up, for whatever deterrent value they may have had.

[52] The Defendant and her husband testified that they did not know the security patrols had been removed until the summer of 2007, when there was a break-in at the medical office. The Defendant testified that she was shocked to find out that there were no security patrols, and that had they known they would have taken steps to protect themselves better. She stated that this was the "last straw" which convinced her and her husband that they could no longer continue in this location.

[53] I have no doubt that the break-in was upsetting. The thieves were likely looking for drugs and/or other valuables, and took some items belonging to the Defendant which were later found at the bottom of the Sackville River.

[54] From a legal standpoint, however, there is no evidence that the system of occasional security patrols would have prevented this break-in. Nor does it appear that the Defendant took advice which had previously been given, to the effect that she should have installed an alarm system. And moreover,

there is no basis to say that the landlord had any legal duty to supply security patrols.

[55] I cannot say whether Ms. Ruggles ever told the Defendant or any of her staff that the security patrols had been discontinued. Clearly the lines of communication between this landlord and tenant were pretty thin. It is at least as probable as not that the word was given, likely to one of Dr. Lappin's staff rather than herself, since she did not concern herself with such things and allowed her staff to deal with anyone who walked in, including the property manager.

[56] For all of these reasons, I cannot find any breach by the landlord of its legal obligations, and certainly nothing that would constitute or even contribute to a fundamental breach.

Fundamental Breach

[57] If there were any breaches by the landlord in this tenancy relationship, they were minor matters that ought to have been attended to and adjusted, if necessary, at the time they occurred. There is clearly no single item which might constitute a breach of sufficient magnitude to amount to a fundamental breach, and the sum of a series of minor breaches (if so found) would have to be pretty impressive to add up to a fundamental breach. That is not the case here.

[58] On all of the evidence, I am satisfied that the Defendant and her husband harboured a set of minor grievances which were in the nature of annoyances and inconveniences. They did not interfere to any substantial

degree with the operation of the Defendant's professional practice. She was by all accounts a very busy doctor, with a bustling practice that turned away new patients. She received the full benefit, or substantially so, of the premises that she leased.

[59] It is very likely that the Defendant was planning to move and not renew this lease, which would have been entirely within her rights. By April of 2008, there were only a few months left on the lease and the logical thing would have been to look for new premises that could be made ready to coincide with the end of the old lease.

[60] Instead, the Defendant decided to do what is sometimes colloquially referred to as a "midnight run" - moving out without any advance warning to the landlord under the cover of darkness. She soon thereafter surfaced in new premises on Cobequid Rd.

[61] Dr. Lappin was asked on cross-examination whether her new landlord had agreed to indemnify her for any part of the claim by Homburg. The answer was equivocal, to the effect that it had not yet been discussed. It was not a flat denial. This supports my finding that the Defendant only decided to move when a new premises came to her attention, which she felt had to be taken immediately. Perhaps the new landlord was unwilling to hold it for four months. Perhaps the Defendant simply decided that it was worth the possibility of paying double rent for a few months, and that perhaps Homburg would settle for something less than the full amount. Perhaps there was some form of lease incentive which made it worthwhile.

[62] Whatever the precise reason, the Defendant bolted from this premises and exposed herself to a claim for damages. For all of the reasons already given, I am unable to find any valid defence to that claim, or any counterclaim which might offset some of the liability.

Mitigation

[63] Damages are always subject to the duty to mitigate. The evidence before me was to the effect that the premises stood empty long after the expiry of the lease term, despite efforts to re-lease it. The onus is on the Defendant to prove a lack of mitigation, and there was no real evidence offered to support a mitigation failure. I recognize that it can be difficult for someone in the position of the Defendant to produce such evidence, but something beyond mere conjecture or speculation is required.

Measure of Damages

[64] The Claimant's claim breaks down as follows:

Rent for June, July and August	$7,177.05
Additional rent (expenses etc.) for that same period	$1,907.92
Additional rent (@ $100 per day) pursuant to Clause 22(c) (which will be discussed below)	$8,300.00

Expenses (legal fees) as per Clause 41(d) (which will also be discussed below)	$3,527.06
Interest on arrears at 26% pursuant to Clause 9 (which will also be discussed below)	$1,312.57
	$22,224.60

Rent arrears and additional rent

[65] This claim is straightforward. The Defendant allowed her May rent cheque to go through but failed to pay basic rent for the last three months of the lease. I accept the amount of $7,177.05 as claimed.

[66] The sum of $1,907.92 for additional rent is also straightforward, representing the sums attributable to the vacated premises for routine items that are charged back to tenants.

Additional rent at $100 per day

[67] This claim is based on Clause 22(c) of the lease:

> 22(c) ... the Tenant will diligently and efficiently conduct its business in and use the whole of the Premises continuously and actively thought (sic) the Term in an up-to-date, first class and reputable manner befitting the Shopping Center and on the days and during the hours that the Landlord from time to time designates ..... Failure by the Tenant to be open during the hours and days as the Landlord may request from time to time shall entitle the Landlord to a payment of $100.00 per diem, as Additional Rent, which the Tenant agrees is a genuine pre-estimate of liquidated damages representing the

> minimum amount of damages which the Landlord shall be deemed to have suffered for loss of percentage rentals payable by other tenants in the Shopping Center to which the Landlord might have otherwise become entitled, and to the loss of the effect of advertising and commercial expenses incurred by the Landlord on behalf of the Shopping Center, and are without prejudice to the Landlord's right to claim and prove a greater sum as damages or to avail itself or (sic) any other remedies for breach hereunder .....

[68] The Claimant argues that this is a legally enforceable contractual term, representing a genuine pre-estimate of damages. The Defendant contends that it is a penalty clause which the court should disallow.

[69] The Defendant argues in the alternative that the claim should be reduced because Dr. Lappin only worked four days per week, not five.

[70] Provisions like Clause 22(c) exist because landlords recognize that there is a significant but difficult to quantify effect on traffic to a mall when there are empty stores. The rationale was discussed in an article entitled *Is an Interlocutory Injunction Available to Enforce a Positive Operating Covenant in a Lease?* [1994] Advocates Quarterly 206 by lawyer Irving Schein at p 207:

> "The loss of an important tenant in operation in a plaza will result in some reduction in pedestrian traffic. This can be expected to have a negative effect on most if not all of the other tenants in the plaza unless that tenant is quickly replaced by a similar type of tenant who is prepared to operate. The image and reputation of the plaza will be damaged. Other tenants will be less willing to renew their leases upon their expiry because of the loss of an important tenant upon whom they rely to draw customers. Those that do renew their leases may insist on lower rental rates for the renewal terms because of what those tenants will perceive as a significant

> reduction in the rental value of space in the plaza. Because pedestrian traffic in the plaza will be reduced, perhaps significantly, the financial health of the other tenants will be jeopardized and the landlord's opportunity to earn percentage rent from those tenants with percentage rent obligations will decrease.....
>
> "The fact that a tenant may cease to operate but continue to pay rent has no ameliorating effect whatsoever on these problems."

[71] In other words, people are attracted to busy centres and stay away from abandoned ones. This can create losses for the landlord in two ways. Where there are leases which give the landlord a percentage of the tenant's sales as additional rent, this revenue stream may be reduced. And it may simply be more difficult for the landlord to attract new tenants to the mall, or attract higher rents, where there is a pervasive sense of vacancy about the place.

[72] The first point to be made is that this type of clause appears in commercial leases because landlords wish to impose a positive obligation on tenants to remain open for business during the term of the lease. That positive obligation is difficult to enforce other than by stipulating damages. There are numerous cases which note that the courts will not use mandatory injunctions to force businesses to stay open. So without a possible claim for damages, the clause would be useless, and without some genuine pre-estimate of damages, it would be very difficult to enforce.

[73] Several cases and articles were cited to me, which discuss the issue of liquidated damages vs. penalty clause.

[74] One of the leading cases is *H.F. Clarke Limited v. Thermidaire Corp. Ltd.* [1976] 1 S.C.R. 319. As stated in the headnote:

> "As to whether the formula fixing damages was in the circumstances a penalty, while it is always open to parties to make such a pre-determination of damages or their measure this must yield to judicial appraisal of its reasonableness. The doctrine that a sum will be held to be a penalty if extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach is well established and does not lose its force in cases where exact calculation or pre-estimation is difficult."

[75] I must ask myself whether in all of the circumstances, $100 per day - representing approximately a doubling of the rent - is a genuine effort to pre-estimate damages, or an unreasonable (or unconscionable) penalty.

[76] I note that the Clause 22(c) uses the measure of $100 per day as a minimum and does not preclude a greater amount being proved.

[77] It is difficult for me to be critical of a landlord that regards it to be in its financial interest to have commercial tenants that agree to stay open and enliven the sense of busy-ness of the plaza. A busy medical practice can attract dozens, if not hundreds, of visitors each day, who while already in the plaza might patronize another merchant. In the case of a thriving plaza, the whole is greater than the sum of its parts.

[78] I do not regard $100 per day as an unreasonable pre-estimate of damages. It does not shock my conscience. While there is no evidence that this landlord lost any percentage rent, all of the other negative consequences of having an unscheduled vacancy can be presumed to have occurred.

[79] I emphasize again that this Defendant agreed to all of the terms of the lease, whether or not she liked them. She knew or ought to have known the price of ducking out before the expiry of the lease.

[80] I must consider the alternative argument, that she should only be charged for four days per week. She argued that the landlord knew that she was only working four days per week. However, the evidence was that there were several other physicians working out of this office, and it does not appear that the office was only open four days per week. The issue is not when Dr. Lappin worked - it is when the clinic was open. The landlord is only charging for week days when, on the evidence, it appears the office worked on some weekends. Accordingly, I believe the claim for business days, Monday to Friday, is reasonable.

Rate of Interest

[81] The claim for interest at a rate of 26% seems rather lavish in this day and age, but one must not lose sight of the fact that this lease was negotiated in a different time. The relevant clause reads:

> 9. Interest
> In every case where the Tenant shall fail to pay a Rent when due or shall pay an amount which is thereafter determined estimated or found to be less than the amount properly due, the Tenant shall pay interest at the rate of Twenty-six Percent (26%) per annum (or if such rate of interest shall become unlawful, at the maximum rate permitted by law) on any unpaid amount or deficiency from the date it was properly due until paid and such interest shall be due and payable as Additional Rent.

[82] In the absence of such a clause, I would be limited by the applicable regulations under the Small Claims Court Act to awarding prejudgment interest at 4%[1]. However, contractual terms such as Clause 9 are, in my view, legally enforceable and this claim is accordingly allowed.

Solicitor and client costs

[83] The landlord has advanced a claim for some of its legal costs incurred in pursuing this claim. This requires me to consider the impact, if any, of s.15(2) of the Small Claims Court Forms and Procedures Regulations, which state:

> 15 (2) No agent or barrister fees of any kind shall be awarded to either party.

[84] The Claimant points to two separate provisions in the lease which would allow such a claim. They are:

> 10. Enforcement and Collection
> The Tenant will pay and indemnify the Landlord, without limitation, for and against all charges (including legal fees on a solicitor and its own client basis, and disbursements) lawfully incurred in enforcing payment of any amounts owing under this Lease (including without limiting, rent and damages arising from an alleged breach of covenant or condition of this lease) or in obtaining possession of the Premises after default of the Tenant or upon expiration or earlier termination of this Lease, or in enforcing any covenant, provision or Agreement of the Tenant herein contained.

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[1] 16 An adjudicator may award prejudgment interest at a rate of four percent per annum in the same circumstances in which prejudgment interest may be awarded by the Supreme Court.

> 41(d) if the Landlord brings an action against the Tenant for recovery of the Premises or for Rent or damages arising from an alleged breach of a covenant or condition in this lease to be complied with by the tenant, the Tenant will pay to the Landlord all expenses incurred by the Landlord in the action including fees and expenses on a solicitor and his own client basis. (Emphasis added)

[85] Section 15(2) of the regulation reflects a very clear policy by the Legislature that to allow Adjudicators to award legal costs relating to representation in court would undermine the ability of this court to perform its assigned function. While I do not purport to know exhaustively what that policy is, it is quite obvious that it would raise the financial stakes in every case, and possibly force more litigants to hire lawyers to compete on an equal footing. It would change the character of the court.

[86] I note that there are Small Claims Courts in some provinces, such as Quebec, which forbid lawyers from appearing altogether. While Nova Scotia has not gone that far, it has made it clear that parties who wish to use lawyers in this court must do so at their own expense without a hope to recoup that cost from the other party.

[87] The fact that there are no costs awarded for the effort of preparing for and attending at trial does not necessarily mean that a legal expense incurred prior to trial cannot become the subject of a claim.

[88] In the case here, before a claim was even contemplated, the landlord incurred legal expenses. In evidence are a number of invoices from Mr. O'Hara, who was retained to respond to the fact that the tenant had vacated prematurely. There is one account dated June 5, 2008 for $280.24

and another dated June 30, 2008 for $146.05, which do not include any time spent preparing a claim for issuance. All of the accounts thereafter relate to the drafting, issuance and service of the claim, and preparation for the hearing.

[89] I believe that regulation 15(2) stands firmly in the way of my allowing any lawyer's expenses that begin with the drafting of the claim for issuance in this court. The pre-litigation expenses totalling $426.29 stand on a different footing. The landlord is contractually entitled to be reimbursed for those expenses on a solicitor and client basis. These relatively small amounts appear reasonable and I would not disturb them.

[90] Once the landlord made a decision to use the Small Claims Court to pursue its claim, it came under the regulation and implicitly abandoned any further claim to reimbursed for its lawyer's fees. Obviously its disbursements are not affected, and I have jurisdiction to allow those to a successful party. That amount adds an extra $253.23 ($174.13 for filing plus $79.10 for serving the claim).

THE COUNTERCLAIM

[91] It is appropriate to say a few more words about the counterclaim. The claim totals $18,700.00. It is broken down, and includes mostly staff time dealing with problems and/or enduring less than perfect conditions, and lost revenue for several days when the office had to be closed due to the break-in and after a major water leak. Other small items are claimed.

[92] I have already found that the tenant failed to give the landlord proper notice of problems, which in turn would have triggered a duty to attend to those problems with a possible consequence in damages had the landlord not done so. I do not find that this landlord was in breach of the lease. Perhaps if held to a standard of perfection, the premises could be said to have been inadequate or troublesome, but in the grand scheme of things I do not believe that this tenancy suffered anything other than minor annoyances which were only made worse by the failure of the tenant to assert her complaints in writing.

[93] Again, I do accept that the Defendant and her Husband were less than fully satisfied with their situation, but unfortunately for them they mismanaged the relationship, took a (presumably) calculated risk by breaking the lease and left themselves exposed to the consequences that they now face.

[94] I am unable to allow any of the items set out in the counterclaim.

CONCLUSIONS

[95] For all of the above reasons, I allow the following:

Rent for June, July and August	$7,177.05
Additional rent (expenses etc.) for that same period	$1,907.92

Additional rent (@ $100 per day) pursuant to Clause 22(c)	$8,300.00
Expenses (legal fees) as per Clause 41(d)	$426.29
Interest on arrears at 26% pursuant to Clause 9	$1,312.57
Costs (filing and serving claim)	$253.23
	$19,377.06

[96] The Claimant shall accordingly have judgment for $19,377.06. The counterclaim is dismissed.

Eric K. Slone, Adjudicator